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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANDRE DEMITRIES HUGHES, Defendant and Appellant.	A103414 (Contra Costa County Super. Ct. No. 50302042)

I.

INTRODUCTION

On July 15, 2003, appellant Andre Demitries Hughes entered a no-contest plea to second degree robbery (Pen. Code, §§ 211; 212, subd. (c).)[1] He admitted personally using a deadly weapon within the meaning of section 12022, subdivision (b)(1), admitted one prior strike serious felony conviction (§ 667, subds. (b)-(i)) and admitted two prior serious felony convictions (§ 667, subd. (a)(1)). On appeal, he contends he should be allowed to withdraw his plea because it was induced by a misrepresentation that a certificate of probable cause would issue, preserving for appeal certain issues that are not cognizable after a plea. The Attorney General concedes the error. We reverse and remand with directions to permit appellant to withdraw the plea. We further determine that the trial court properly applied section 2933.1, which limits worktime credits to

[1] All statutory references are to the Penal Code.

15 percent of actual time spent in custody for persons convicted of a felony listed in section 667.5, subdivision (c), in calculating appellant's worktime credit.

II.

FACTS AND PROCEDURAL HISTORY

The evidence at the preliminary hearing established that on April 2, 2000, appellant entered a Subway sandwich shop in El Cerrito and confronted the clerk with a large kitchen knife, ordering her to the floor. He then forcibly obtained the money from the cash register. Appellant was subsequently apprehended in the vicinity of the restaurant and was identified as the robber by the clerk in a one-person show-up.

As already noted, pursuant to a plea agreement, appellant entered his no-contest plea to second degree robbery with use of a knife. He also admitted one strike and two prior serious felonies. Appellant pleaded no contest after the trial court assured him that certain issues would be preserved for appeal, including whether he was denied the right to a speedy trial and whether the in-field identification by the victim was tainted. The remaining charges were dismissed, probation was denied, and appellant was sentenced to state prison for a term of 15 years.

On July 24, 2003, appellant filed a timely notice of appeal. On July 28, 2003, the court issued an order granting application for certificate of probable cause purportedly permitting appellant to raise the issues that he had preserved for appeal.

III.

DISCUSSION

A. Withdrawal of Plea

Appellant argues that when a no-contest or guilty plea[2] is entered in reliance upon a trial court's promise that a nonappealable issue may be raised on appeal, the plea may be withdrawn. As appellant points out, at least two of the issues asserted in the application for certificate of probable cause—the purported denial of his right to a speedy

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[2] As appellant concedes, guilty pleas and no contest pleas are "functional[ly] equivalent." (*People v. Robinson* (1997) 56 Cal.App.4th 363, 368.)

trial and improper in-field identification—are not cognizable on appeal after a guilty plea. (*People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1357; *People v. Stittsworth* (1990) 218 Cal.App.3d 837, 839; *People v. Mink* (1985) 173 Cal.App.3d 766, 769.) He claims that the court's promise to issue a certificate of probable cause preserving these issues induced him to enter into the plea bargain, and that the promise was "illusory" because the issuance of the certificate does not "make cognizable those issues which have been waived by the plea of guilty. [Citation.]" (*People v. Kaanehe* (1977) 19 Cal.3d 1, 9.) Appellant concludes that his conviction therefore must be reversed and the matter remanded so that he can, if he wishes, withdraw his plea. (See, e.g., *People v. Truman* (1992) 6 Cal.App.4th 1816, 1820-1821; *People v. Hollins* (1993) 15 Cal.App.4th 567, 574-575.)

The Attorney General commendably concedes that appellant's conviction must be reversed and the matter remanded to the trial court. We agree. As the court explained in *People v. Bonwit* (1985) 173 Cal.App.3d 828, "one of the promises or representations made to [defendant] inducing his guilty plea was the court's own promise to issue a certificate of probable cause '[i]n order to protect the defendant's rights on appeal.' The promise was illusory and therefore was an improper inducement which voids the plea. [Citation.] We recognize [defendant] should be given an opportunity to reevaluate his guilty plea and withdraw that plea and proceed to trial if he so desires. [Citations.]" (*Id.* at p. 833.) Accordingly, appellant is entitled to reevaluate his plea and withdraw it and proceed to trial should he elect to do so.

B. Conduct Credits Under Section 2933.1

Appellant also questions whether the trial court erred in limiting his presentence worktime credits to 15 percent of actual time spent pursuant to section 2933.1, subdivision (a).[3] Appellant contends the trial court erred by limiting his presentence

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[3] Section 2933.1, subdivision (a), provides: "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933."

conduct credits to 15 percent pursuant to section 2933.1. He reasons that the trial court applied this rule erroneously to limit his presentence custody credits because, when section 2933.1 was enacted in 1994, section 667.5 did not include second degree robbery.

As appellant emphasizes, in 1994, the only robberies identified in section 667.5 were those "perpetrated in an inhabited dwelling house, vessel . . . which is inhabited and designed for habitation, an inhabited floating home . . . , an inhabited trailer coach, . . . or in the inhabited portion of any other building, wherein it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of that robbery." (Former § 667.5, subd. (c)(9).) Second degree robbery was not included in section 667.5 until the voters adopted Proposition 21 effective March 8, 2000.[4] Because appellant was not convicted of the kind of robbery included in section 667.5 when it was originally enacted, he argues that the credit limitation in section 2933.1 was inapplicable and, instead, section 4019, with its more generous worktime credit provision, should have been applied.

In *People v. Van Buren* (2001) 93 Cal.App.4th 875 (*Van Buren*), disapproved on another point by *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3, the court resolved the precise issue appellant raises. In *Van Buren*, as here, the defendant was convicted of second degree robbery, and the trial court limited his custody credits pursuant to section 2933.1. The Court of Appeal rejected the claim that section 2933.1 applied only if second degree robbery was listed in section 667.5 when section 2933.1 was adopted in 1994.

In doing so, the *Van Buren* court relied primarily on the purpose behind section 2933.1—to prolong a dangerous offender's prison sentence in order to protect the public. (*Id*. at p. 880.) The court also noted that the analysis of the bill in the legislative history referred to "violent felonies," not to section 667.5, subdivision (c) specifically. (*Id*. at pp. 880-881.) The court believed the legislative history confirmed that "the Legislature

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[4] Pursuant to the initiative amendment approved March 7, 2000, section 667.5, subdivision (c)(9), now defines "violent felony" to include "[a]ny robbery."

was considering crimes of violence as a category of offense which may evolve over time." (*Id*. at p. 880.) The court also found that it was reasonable to conclude that the Legislature did not expect to amend section 2933.1 each time section 667.5 was amended. (*Id*. at pp. 881-882.) The *Van Buren* court concluded: "The scope of the statute, together with its legislative history, establishes that section 2933.1 was intended to apply generally to felonies listed in section 667.5, subdivision (c), as that subdivision is amended from time to time." (*Id*. at p. 880.)

We find the reasoning of *Van Buren* sound and its result correct. Consequently, we reject appellant's contention and conclude section 2933.1 incorporates the subsequent amendments to section 667.5 and applies to appellant.

IV.

DISPOSITION

The judgment is reversed and the cause remanded to the trial court. If appellant moves to withdraw his plea within 30 days of the finality of our decision, the superior court is directed to vacate the plea and reinstate the information for further proceedings. Should appellant not move to withdraw his plea within the 30-day period, the superior court is directed to reinstate the judgment.

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Ruvolo, J.

We concur:

_____
Kline, P.J.

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Lambden, J.